

# Judging the Fugitive Slave Acts

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## INTRODUCTION

In *Justice Accused*, Robert Cover set out to study the phenomenon of judges who enforce laws they themselves believe to be unjust.<sup>1</sup> He notes that with the exception of the Nazi legal system, this phenomenon has rarely been studied.<sup>2</sup> Cover observes that, in various periods, American judges seem to suffer from an irresolvable tension between their moral commitments and their commitment to neutral and formal legal interpretation. Cover calls this tension the moral/formal dilemma.<sup>3</sup> To demonstrate this point, he analyzes constitutional adjudication in the years of conflict during which Northern federal judges—many of them committed abolitionists—enforced the Fugitive Slave Acts of 1793 and 1850 against Blacks and those who helped Blacks escape the slave-catchers.<sup>4</sup>

The Fugitive Slave Acts of 1793 and 1850 provided for federal involvement in slave-catching in Northern states and (in 1850) established federal officers to assist in slave-catching and penalties for obstruction of such activity.<sup>5</sup> Many federal judges said in opinions that these two laws “forced” them to decide in favor of slavery, an institution they considered evil.<sup>6</sup> Cover observes that the only way these judges could confront these cases was to adopt an attitude in which they saw the law as only a formal game.<sup>7</sup> Of importance to the modern

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1. R. COVER, *JUSTICE ACCUSED* (1975).

2. *Id.* at 1.

3. *Id.* at 197-98.

4. *Id.* at 119.

5. Act of February 12, 1793, 1 Stat. 302 (1793) [hereinafter 1793 Act] (providing for removal of alleged slaves “upon proof to the satisfaction of such [federal] judge or [state] magistrates”); Act of September 18, 1850, 9 Stat. 462 (1850) [hereinafter 1850 Act] (expanding federal involvement in capture of fugitive slaves, including providing for appointment of special federal commissioners to hear fugitive rendition proceedings and issue certificates of removal; also establishing penalties for interfering with capture of runaways).

6. See, e.g., *Miller v. McQuerry*, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9,583); *Norris v. Newton*, 18 F. Cas. 322, 326 (C.C.D. Ind. 1850) (No. 10,307); *Giltner v. Gorham*, 10 F. Cas. 424, 432 (C.C.D. Mich. 1848) (No. 5,453); *Vaughan v. Williams*, 28 F. Cas. 1115, 1116 (C.C.D. Ind. 1845) (No. 16,903); *Jones v. Vanzandt*, 13 F. Cas. 1047, 1048 (C.C.D. Ohio 1843) (No. 7,502); *Johnson v. Tompkins*, 13 F. Cas. 840, 843 (C.C.E.D. Pa. 1833) (No. 7,416). For state opinions, see, e.g., *Sim’s Case*, 61 Mass. (7 Cush.) 285, 304 (1851); *Jackson v. Bulloch*, 12 Conn. 38, 57 (1837).

7. R. COVER, *supra* note 1, at 123-25.

reader, however, is Cover's suggestion that the Northern judges' formalistic<sup>8</sup> approach rested upon a theory of adjudication—legal positivism—that is as prevalent today as it was in 1850.<sup>9</sup> Thus, Cover implies that contemporary judges suffer in ways significantly similar to the Northern judges of 1850.

In 1975, Ronald Dworkin reviewed *Justice Accused* and rejected Cover's claim that there was anything necessary about the dilemma the Northern judges faced. He argues that judges today have at their disposal a theory of adjudication that could have solved the moral/formal dilemma faced by judges in 1850.<sup>10</sup> Dworkin's theory of adjudication, which will be explored in some detail below, requires that judges interpret the Constitution in terms of theories that "make the community's legal record the best it can be from the point of view of political morality."<sup>11</sup> If only these judges had applied his theory, Dworkin argues, they would have seen that the 1850 Act violated the Constitution.<sup>12</sup> Dworkin's argument seems implausible, however, once one recalls that the 1793 and 1850 Acts appear consistent with the fugitive slave clause of the Constitution.<sup>13</sup> Further, not only did the Constitution not forbid slavery, but during the Founding most Northern states displayed none of the concern for due process rights of alleged slaves that Dworkin finds in the Constitution as ratified in 1787.<sup>14</sup>

This Note argues that, properly reconceived, Dworkin's theory of adjudication could have provided judges with an argument for the unconstitutionality of the 1850 Act. Part I reviews Cover's argument for placing the Northern judges in the moral/formal dilemma, and explores the broader consequences of his claim. Part II argues that Dworkin's solution to the dilemma of the judges in 1850 does not work. Part III analyzes Dworkin's theory of adjudication and focuses on its specific application to *Brown v. Board of Education*.<sup>15</sup> Part IV argues that in order for Dworkin's argument about the unconstitutionality of the 1850 Act to be convincing, it must be reconceived to take into account the general principles of interpretation suggested in Dworkin's own

8. Formalism means, in part, that "there are certain rules defining the [judicial] office and that, whatever those rules may be, the judge should obey them." *Id.* at 124. Cover seems to treat "formalism" and "positivism" as synonyms. See *infra* note 9.

9. Positivism "insist[s] on a sharp separation between law and morality." J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 29 (1984). Cover himself does not define positivism. See R. COVER, *supra* note 1, at 257.

10. Dworkin, *The Law of the Slave-Catchers* (Book Review), *TIMES LITERARY SUPPLEMENT*, Dec. 5, 1975, at 1437.

11. R. DWORKIN, *LAW'S EMPIRE* 411 (1986).

12. Dworkin, *supra* note 10, at 1437; also see *infra* text accompanying note 34.

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No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2 [hereinafter the Clause].

14. See Dworkin, *supra* note 10 at 1437; see also *infra* text accompanying note 37.

15. 347 U.S. 483 (1954).

discussion of *Brown*.<sup>16</sup> Dworkin's theory, as reconceived, is then used to demonstrate the unconstitutionality of the 1850 Act. This Note concludes by demonstrating how judges using the reformulated Dworkinian approach might have found the 1850 Act unconstitutional.

An improved Dworkinian argument for the unconstitutionality of the 1850 Act has more value than merely making Dworkin's 1975 claims plausible. Such an argument serves to undercut Cover's condemnation of the American judiciary. Cover felt strongly that the predicament of the Northern judges was not an isolated incident; he uses that moment to symbolize the dilemma of adjudication in American law. Further, in sustaining Dworkin's challenge to Cover, we help defend Dworkin's theory of adjudication against other, less friendly, critics. Dworkin is an influential defender of what some have called "judicial activism"; his theory of law as interpretation seeks to defend the liberal against the charge that he is legislating from the bench.<sup>17</sup> Cover, who was in few respects a political conservative, mounts a critique that recalls the conservative attack on Dworkin and his allies.<sup>18</sup> It is important to see how Dworkin can confront this challenge.

#### I. THE DILEMMA OF THE NORTHERN JUDGES

Robert Cover argues in *Justice Accused* that the Fugitive Slave Acts<sup>19</sup> created a "moral/formal" dilemma for Northern judges. As judges, these men had sworn to uphold the Constitution and the laws of the United States. It seemed apparent to many judges that the federal government's intentions were clear, that the Acts had been passed by valid majorities in Congress, and that they were sanctioned by the Constitution. But, as Northern elites, many of them held strong abolitionist beliefs and considered slavery (and, by extension, the capture of Blacks for return to a life of slavery) evil. These judges lived in a world where, with increasing frequency, many politicians, state judges, and other legal elites were arguing for the rejection of the Fugitive Slave Acts.<sup>20</sup> The dilemma, then, lay between the judges' moral beliefs and their formal legal obligations.

Cover's conclusion is that the leading legal theory of the age—legal positivism—so dominated these judges that they could see but not act upon the appeals made from natural law<sup>21</sup> in their courtrooms. Cover concludes that

16. See R. DWORKIN, *supra* note 11, at 387-89.

17. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 58 (1980); see also Dworkin, *The Jurisprudence of Richard Nixon*, 17 N.Y. REV. BOOKS 27 (1972).

18. See A. ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 123-30 (1990) (describing the debate between Allan Hutchinson and Ronald Dworkin over legal interpretation).

19. See *supra* note 5.

20. See T. MORRIS, *FREE MEN ALL* (1974) (describing political and judicial steps taken in North to oppose slave-catching); J. TENBROEK, *EQUAL UNDER LAW* 157-74 (1965) (describing rise of abolitionism).

21. Under natural law, "no rule can count as a law unless what it requires is at least morally *permissible*." J. MURPHY & J. COLEMAN, *supra* note 9, at 13.

it was the very same technical skill that led these men to be judges that barred them from acting on their beliefs and rejecting the slave laws.<sup>22</sup> The conscientious application of positivism led to "cognitive dissonance" amongst many judges of 1850.<sup>23</sup> Cover suggests that these judges responded in two ways. First, they exaggerated the mechanical operation of the law, so as to deny to themselves any discretion and thereby excuse their failure to act.<sup>24</sup> Second, they "raised the formal stakes" in the cases before them by claiming that if political or moral values were introduced into the process of adjudication, the authority of the state over all citizens would be eroded.<sup>25</sup> Put most starkly, Cover depicts the Northern federal judges of 1850 as saying that in such morally charged cases as those concerning fugitive slaves, adjudication did not require moral judgment, and worse, moral judgment would imperil the state's authority.

Cover clearly believes that nineteenth-century America was entering a period in which legal positivism would become the preeminent approach to law.<sup>26</sup> Although Cover never draws the connection himself, the pre-Civil War condition described in *Justice Accused* is generalized in Cover's later writings examining other periods of American law.<sup>27</sup> Cover's American positivism aspires to a legal system built of rules whose interpretation require the minimum of normative judgment by their interpreters.<sup>28</sup> In this respect Cover's character-

22. "[T]here was a general, pervasive disparity between the individual's image of himself as a moral human being, opposed to human slavery as part of his moral code, and his image of himself as a faithful judge, applying legal rules impersonally . . ." R. COVER, *supra* note 1, at 228.

23. "[I]nconsistency among consciously held and articulated principles will generate some tension and a tendency to try to reduce the area of inconsistency [hence the retreat to formalism]." *Id.* at 227-28 n.\*.

24. *Id.* at 233.

25. *Id.* at 231.

26. *Id.* at 258-59. For support for Cover's analysis, see Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

27. Cover's essay, *Nomos and Narrative*, for example, suggests a particular mythic self-image of American legal culture: one in which judges strive to establish rules that are above the specific commitments of the warring factions of a pluralistic society, and thereby avoid voicing support for one normative community over another. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 58 (1983); see also Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L. J. 1, 62 (1989) (for Cover, American judges exercise authority to the exclusion of the creation of meaning by communities).

28. Thus, according to Kahn, Cover concludes that, from the perspective of American legal positivism, "interpretation may remain forever outside of the practical reality of constitutional law." Kahn, *supra* note 27, at 63. In *Nomos and Narrative*, for example, Cover argues that the Supreme Court tends to present adjudication as free of normative commitment. See Cover, *supra* note 27, at 54-55. Cover is skeptical of the claim that the federal courts can serve as a neutral arena in which communities living in radically different moral worlds (*nomoi*)—for example, the Amish, Hasidim, or Christian Fundamentalists—may reconcile their differences with the majority or with other groups. He criticizes the Court's opinion in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), because the Court upheld, on technical grounds, an Internal Revenue Service decision against extending a tax subsidy to a racist Fundamentalist Christian college. The Court was clearly unwilling to make explicit that in rejecting the university's claim, it was choosing, in an important way, one *nomos* and its view of the Constitution over another. Here too, Cover sees judicial "cognitive dissonance." In *Bob Jones* the Supreme Court retreated into formalism, and tried to minimize the extent to which its preference for one moral world over another affected the case's outcome. The result is, for Cover, an incoherent, almost baffling opinion. Cover, *supra* note 27, at 66-67.

ization of positivism is, as will be seen below, almost identical to Dworkin's.<sup>29</sup> In *Nomos and Narrative*, Cover implicitly reaffirms the dichotomy set out in *Justice Accused*: natural law (normative communal vision)<sup>30</sup> on the one side; positivism (bureaucracy and order) on the other. Cover thus finds the moral/formal dilemma a necessary element of American constitutional interpretation. Cover, then, is a pessimistic positivist: formalistic adjudication can yield either the unstable, schizophrenic courts described in *Justice Accused*, or the soulless, "jurispathic"<sup>31</sup> courts described in *Nomos and Narrative*. To rebut Cover's view of adjudication, one would either have to dissolve the moral/formal dichotomy or show why the dichotomy is in fact not a dilemma. As is shown below, Dworkin attempts the former.

## II. DWORKIN'S SOLUTION TO THE DILEMMA

In 1975 Ronald Dworkin reviewed *Justice Accused* and objected to the idea that the Northern judges were "forced" into the moral/formal dilemma: "If that is how the judges saw their predicament, then a failure in jurisprudence contributed to their dilemma. The debate between natural law and positivism had squeezed out a third theory of law . . . ." As a result, "[Justice] Story and the others . . . endured instead the agony of serving an institution they deplored . . . [and] these judges missed a chance to develop an alternative to both natural law and policy-oriented positivism . . . ."<sup>32</sup> Dworkin supported his critique by offering a short argument for the unconstitutionality of the Acts.<sup>33</sup> His argument advances three assumptions about the Constitution: (1) that its conception of individual freedom was antagonistic to slavery; (2) that its conception of procedural justice was inconsistent with the procedures employed by the Acts; and (3) that its conception of federalism was inconsistent with the idea that a state "had no power to supervise the capture of men and women within its territory."<sup>34</sup>

A variety of judicial decisions suggest Dworkin's arguments are unconvincing.<sup>35</sup> Dworkin's first prong, the unconstitutionality of slavery, seems impossible to sustain given that the Constitution specifically regulated slavery and thus

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29. See *infra* notes 47-57 and accompanying text.

30. This is not to say that Cover's theory of *nomoi* is identical to the conventional natural law doctrines held by contemporary theorists. See, e.g., J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 134-56 (1980).

31. Cover, *supra* note 27, at 53.

32. Dworkin, *supra* note 10, at 1437. By "policy-oriented positivism" Dworkin implies an approach that sees the law as a formal process through which the interests of the state are enforced. *Id.*

33. In 1986 Dworkin reaffirmed this argument. See R. DWORKIN, *supra* note 11, at 438 n.27.

34. Dworkin, *supra* note 10, at 1437.

35. See *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); text accompanying *infra* notes 78-82; see also *United States v. Scott*, 27 F. Cas. 990, 996 (C.C.D. Mass. 1851) (No. 16,240) (no federal decision could be found that sustained challenge to constitutionality of Acts). A (relatively) modern restatement of the arguments in these cases can be found in Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 *YALE L.J.* 161 (1921).

implicitly permitted its existence.<sup>36</sup> Dworkin's second prong, the due process argument, is contradicted by the fact that in 1787 many Northern states had not yet demonstrated significant concern for the process due alleged slaves,<sup>37</sup> and there is no reason to believe that full due process was necessary at the certification stage, since defenders of the 1850 Act described slave-catching as merely an extradition proceeding after which the alleged slave could receive a full trial.<sup>38</sup> Dworkin's third prong is inconsistent with the federalist argument of implied powers articulated in *McCulloch v. Maryland*:<sup>39</sup> the Constitution had created a specific federal guarantee for the return of slaves; the federal power to enforce that guarantee necessarily was implied.<sup>40</sup>

If we are to take Dworkin's "third theory of law" seriously, then we must assume that development of his theory will reveal a missing step between his unpersuasive conclusions concerning the 1850 Act and his theory's promise of an escape from formalism. This Note will fill in that missing step; to do this, however, will require a review of Dworkin's general theory of adjudication.

### III. DWORKIN'S GENERAL THEORY AND HIS SOLUTION TO *BROWN*

In order to locate the "missing step," we must reconstruct what Dworkin means when he says that Cover's judges suffered from a "failure of jurisprudence." In the following section we will review Dworkin's general critique of two leading American theories of the Constitution, natural law and positivism.<sup>41</sup> The subsequent section will apply Dworkin's general critique to *Brown*.

#### A. *Dworkin's Critique of Natural Law Theory and Positivism*

Dworkin believes that the moral/formal dilemma embraced by Cover is a trap set up by the positivist in order to make positivism attractive. The trap creates two artificial categories which bear little relation to legal practice: legal

36. See U.S. CONST. art. IV, § 2. Slavery is also implicitly referred to at U.S. CONST. art. I, § 2, cl. 3 ("all other Persons" count as three-fifths of "free Persons" for calculating apportionment), art. I, § 9, cl. 3 (Congress may not regulate slave trade until 1808).

37. See *Scott*, 27 F. Cas. at 996 (Founders did not provide alleged slaves full due process); R. COVER, *supra* note 1, at 162-63 (antislavery bar did not make due process arguments until 1820's and 1830's); T. MORRIS, *supra* note 20, at 26-27 (due process protections delayed until after 1800).

38. See *Scott*, 27 F. Cas. at 990-91 (commissioner's task was simple extradition procedure); *Miller v. McQuerry*, 17 F. Cas. 335, 339-40 (C.C.D. Ohio 1853) (No. 9,583) (same).

39. 17 U.S. (4 Wheat.) 400, 421 (1819) ("Let the end be legitimate . . . and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional").

40. See D. FEHRENBACHER, *SLAVERY, LAW & POLITICS* 22-25 (1981); Horowitz, *Choice-of-Law Decisions Involving Slavery: "Interest Analysis" in the Early Nineteenth Century*, 17 UCLA L. REV. 587, 598-600 (1970).

41. This Note does not address the claims made by the Legal Realists or the Critical Legal Studies movement. Although Dworkin responds to each of these schools of thought, the main thrust of his argument, since the early 1960's, has been to weave a course between natural law and legal positivism. See R. DWORKIN, *supra* note 11, at 36-37, 271-74. Curiously, Cover did not seem to find Legal Realist or CLS alternatives worthy of much attention in either *JUSTICE ACCUSED* or *Nomos and Narrative*.

positivism ("which insists that law and morals are made wholly distinct by . . . rules everyone accepts for using 'law'") and natural law ("which insists, on the contrary, that [law and morality] are united").<sup>42</sup> The false dichotomy poses a choice between positivism and natural law, or between setting out the judge's responsibility as searching for what the law "is" as opposed to what it "ought to be." Although Dworkin reserves most of his critique for positivism, we should briefly examine why Dworkin finds natural law theories unacceptable.

Dworkin considers natural law, or what some might call moralism, to be a form of impermissible judicial activism.<sup>43</sup> A natural lawyer would "ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture."<sup>44</sup> A natural lawyer thinks that "the Constitution is only what the best theory of abstract justice and fairness would produce by way of ideal theory."<sup>45</sup> For example, a natural lawyer might argue that the fugitive slave clause could never have sanctioned the existence of slavery in any part of the United States, since that would have contradicted the demands of justice and liberty. If the natural lawyer argues that she is not ignoring the text of the Constitution, but instead interpreting its own claims as set forth in the Preamble,<sup>46</sup> Dworkin's resistance softens, but only slightly. An "interpretivist" natural lawyer who always found the laws she was interpreting to match her specific moral beliefs most likely would not be a sincere interpreter.<sup>47</sup>

Dworkin's real concern is that the specter of moralism will drive judges to embrace the equally erroneous but more popular theory of legal positivism. Dworkin sees positivism as erring on the other extreme from natural law: the positivist claims that normative or moral argument has *no* role in legal interpretation. According to Dworkin, the positivist claims that "there is no law . . . apart from the law drawn from . . . techniques that are themselves matters of convention," and therefore "that the past yields no rights tenable in court, except as these are made uncontroversial by what everyone knows and expects."<sup>48</sup> In criticisms such as these, Dworkin identifies two major sources of error which underlie the positivist's position.

The positivist's first error, according to Dworkin, is to imagine that a legal system is composed entirely of a set of conventions or rules. Dworkin's positivist would like to claim that what are sometimes called legal rules are simply "plain facts available to all" that are not dependent on an individual's moral

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42. R. DWORKIN, *supra* note 11, at 98.

43. *Id.* at 378.

44. *Id.*

45. *Id.* at 397.

46. U.S. CONST. preamble (Constitution designed, in part, to "establish Justice . . . promote the general Welfare, and secure the Blessings of Liberty"); *see also* S. BARBER, ON WHAT THE CONSTITUTION MEANS 52-53 (1984).

47. R. DWORKIN, *supra* note 11, at 104-08.

48. *Id.* at 116, 118.

or political judgment. The "plain fact" view of law is designed to characterize legal interpretation as the reporting of a consensus; thus, even when there is disagreement over the meaning of a law, it stems from controversy over how to report a matter of social consensus, much like when linguists disagree over whether a colloquialism is or is not proper English. Dworkin objects to the plain fact view because it fails to account for the fact that judges and lawyers act as if there are right and wrong legal claims even when all sides admit that there is no social consensus to report. The positivist would have to say that where there are no clear conventions to be found, there is no law, and if the interpreter offers a legal conclusion nonetheless, it is through an act of mini-legislation called *discretion*.<sup>49</sup>

Dworkin argues that judges and lawyers act as if there are right legal answers in the absence of consensus because law's meaning is bottomed upon principles that extend beyond the particular instances of consensus referred to by a case or in a framer's report. Law possesses this "internal logic" because it is an "interpretive concept": a community's law has "a certain structure . . . such that particular substantive theories can be identified and understood as subinterpretations of a more abstract idea."<sup>50</sup>

Interpretive concepts—which are found, for example, in art as well as law<sup>51</sup>—are in a constant state of flux, and the challenge, Dworkin believes, is to identify which new developments are true to the central structure of the concept. Dworkin's picture of interpretation revolves around the idea of constant revision: the interpreter constantly checks new developments in a practice against paradigm examples of the practice that are understood to instantiate the central structure. Usually an interpreter will reject a substantially new approach because it fails to match the paradigms and hence is outside the interpretive concept. Occasionally, however, an interpreter will perceive that the interpretive concept embraces a new approach that fails to match a current paradigm. The interpreter accepts the approach, because she realizes that although "[p]aradigms anchor interpretations . . . no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake."<sup>52</sup> Since the possibility of revision is constant, each interpreter must ask herself at each instance of interpretation, is this a time for revision?

Because this question requires an inquiry into more than the simple existence of a social consensus, the positivist provides an inadequate description of legal interpretation. Yet Dworkin's interpretive attitude is no friend to natural law: while the revision of paradigm cases is an intensely normative activity, it is not identical to an interpreter's choosing according to her own taste, since the idea is to select those cases that best exemplify the practice as the interpret-

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49. *Id.* at 37-43.

50. *Id.* at 71.

51. See e.g., *id.* at 56-57 (Dworkin's discussion of S. Cavell's reading of Fellini's *La Strada*).

52. *Id.* at 72.



er found it. For the interpreter to replace a paradigm because and only because she does not like it, for reasons not rooted in the other paradigms remaining in the concept being interpreted, is invention, not interpretation.

The positivist's second error, according to Dworkin, is to conclude that whenever judges make legal judgments that do not refer to a settled social consensus, the judgments are exercises of discretion in which the judge's personal moral or political preferences are given the force of law. As we saw above, Dworkin attributes this error to a common misunderstanding about the nature of interpretation.

Dworkin considers interpretation to be an activity in which an individual attempts to extend and refine the core structure of a practice and not simply impose her own preferences. Dworkin distinguishes between asking what the Constitution as a single coherent structure means, and asking about either what any single author originally meant or asking about what a majority of the interpreter's contemporaries think the text means.<sup>53</sup> Thus, according to Dworkin's view of law as interpretation, a faithful judge knows that he may be required to improve or revise the "values" of a legal system with which he personally disagrees in the course of determining whether a putative law is part of the legal system.

Dworkin argues that we can talk about what the law really requires, independent of simply aggregating the intentions of those involved in creating or maintaining the law, because the logic of the core structure of a practice can yield a purpose of which even its authors were not aware.<sup>54</sup> In the case of law, the core structure is built around the fact that the acts of a political community are not justifiable unless they satisfy the dual demands of justice and fairness,<sup>55</sup> and this may commit those engaged in legal interpretation to the law in ways which they may not have anticipated.<sup>56</sup>

We now can understand Dworkin's answer to the positivist's second mis-

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53. "[E]ach of the participants in a social practice must distinguish between trying to decide what other members of his community think the practice requires and trying to decide, for himself, what it really requires." *Id.* at 64.

One might object that the real danger comes not from the interpreter who defers to her contemporaries, but the interpreter who invents the meaning of the practice by introducing a purely personal preference and calling it a product of social interpretation. We must be careful, however, to avoid confusing different explanations for this sort of subjectivism. A theory such as Legal Realism would argue that interpretation is always and inevitably a subjective enterprise, and that its appearance is a central part of a normal legal system. *See, e.g.* J. FRANK, *LAW AND THE MODERN MIND* 36 (1931). Dworkin's theory acknowledges the risk of subjectivism, but argues that legal systems are no more likely to be noninterpretable than the social phenomenon of language. *See* R. DWORKIN, *supra* note 11, at 261-62 (rejecting "global internal" skepticism).

54. R. DWORKIN, *supra* note 11, at 54-59.

55. Dworkin defines justice as "a matter of outcomes: a political decision causes injustice, however fair the procedures that produced it, when it denies people some resource, liberty, or opportunity that the best theories of justice entitle them to have." *Id.* at 180. He defines political fairness as follows: "that each person or group in the community should have a roughly equal share of control over the decisions made by Parliament or Congress . . ." *Id.* at 178.

56. "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness." *Id.* at 225.

take. Law, as an interpretive practice, has a purpose or point that is governed by the internal logic of its core values. Those core values are roughly described by the term "integrity," which encompasses the dual values of justice and fairness.<sup>57</sup> Any particular instantiation of a legal system's purpose, however, is a matter of interpretation in which a judge's decision to revise or confirm the status quo is to be based on the judge's own attempt to understand the purpose of the legal system, given all she knows about it. The internal logic of legal practice admits of the possibility that an interpreter will draw conclusions that are novel. Therefore, it is not true that every legal rule which does not fit into the current consensus among lawyers is an act of invention.

### B. *Applying Dworkin to Brown*

This Note's principal objection to Dworkin's argument concerning the 1850 Act was that it was unclear how he could reconcile his theoretical objections to Cover with the practical interpretive difficulties he faced. This "missing step," as it was called above, can be discovered by looking at how Dworkin's theory works in practice. A fitting guide is *Brown v. Board of Education*, which Dworkin treats as an important exemplar of his theory of adjudication.

The important practical principle of interpretation contained in Dworkin's analysis of *Brown* is that what we know about changes in social conditions and political morality must be taken into account when we try to understand how an interpreter discovers which of many possible political theories best represents the constitutional principle at stake. Thus, Dworkin's argument that "separate but equal" may have fit legal practice in 1896 but not in 1954 captures why he thinks that his theory of adjudication is neither a version of natural law nor of positivism: his theory allows written rules to constrain, yet grounds those constraints in the judge's best understanding of what the law, as a coherent set of principles representing the state as a single actor, requires.

The problem Dworkin confronts in explaining *Brown* is that the Framers of the Fourteenth Amendment probably never intended the equal protection clause to be used to prevent state segregation of schools.<sup>58</sup> For Dworkin, Framers' intentions are neither dispositive nor insignificant. Intention is significant, to an extent, yet only in a special way: the Founders' intention is part of the community's "political record"; it carries weight only because it is an excellent indicator of core elements of the legal system's purposes that have survived across time.<sup>59</sup> That this should be so is easy to see: the discussion

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57. *Id.* at 243.

58. See R. BERGER, GOVERNMENT BY JUDICIARY 38-44 (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

59. R. DWORKIN, *supra* note 11, at 365. Recall that for Dworkin, judges ought to be interested in the purposes of the laws or legal system, and not necessarily in the intentions of those who wrote or later interpreted the laws in the legal system.

of interpretation above assumed that an interpreter begins with the practice he is given. Practices—especially those largely constituted by statutes and legal decisions—have approximate beginnings and relatively definite groups of authors. The origins of the practice, while not wholly controlling the practice's meaning, will almost certainly be an important source of meaning for any subsequent interpreter. But since an interpreter is interested in the law's purposes, he must consider the possibility that past interpreters, including framers, misapplied some portion of the core structure of the law.<sup>60</sup>

In explaining how *Brown* and *Plessy v. Ferguson*<sup>61</sup> could both be faithful interpretations of the Constitution, Dworkin hypothesizes that even if the same core principle of equal protection were understood by the Supreme Courts of 1896 and 1954, each could have properly drawn opposite conclusions on the constitutional permissibility of "separate but equal" racial segregation because in testing the law they used different constitutional theories of racial equality, each of which was adequate for its time.<sup>62</sup>

Dworkin's argument in the case of *Brown* is that the theory of racial equality upon which *Plessy* was decided may have been "adequate under the tests of [integrity] at some time in our history," but it clearly was not adequate in 1954.<sup>63</sup> Dworkin argues that the interpretation of equal protection that was adequate in 1896 was no longer adequate in 1954 because the theory of racial equality upon which *Plessy* was decided was implausible in 1954: "The American people would almost unanimously have rejected it" and so would have, one

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60. An easy example of this would be the case of corporate personhood. It may be that each Framer in 1787 specifically understood that the Fifth Amendment's due process clause did not protect corporations. Yet in the 1880's a judge who believed that a corporation was a person under the Constitution would interpret the meaning of the Fifth Amendment consistently with that belief. Compare *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886) (corporations are "persons" within meaning of due process clause of Fourteenth Amendment) with *Graham, The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 375 (1938) (Framers of Fourteenth Amendment did not necessarily intend to treat corporations as persons). The judge's use of the Framers' statements as well as a dictionary published in 1880 would both be appropriate; the weight he places on each as a resource is a question of interpretive technique. But the judge wants to know what the words mean according to the logic of the core structure of the Constitution (and American law as a practice)—not what it meant to the Framers, and not what it meant to the majority of dictionary writers of his time. Nonetheless, it would be highly unusual if there were not a close correlation between the judge's use of the word and its use in contemporary political culture.

61. 163 U.S. 537 (1896) (upholding state "separate but equal" racial segregation law).

62. The theory of racial equality upon which *Plessy* might have relied is restated by Dworkin in the following form. "[I]t supposes . . . that people have no distinct right not to be the victim of racial or other discrimination beyond what the rationality restraint already requires . . . [Thus] the standard requires only that [racial] groups receive the right consideration in the overall balance . . . even though it treats them differently from others." R. DWORKIN, *supra* note 11, at 383. Dworkin suggests that this theory of counting majority preferences regardless of their object could have been the theory of racial equality that the Supreme Court employed in 1896, and that an interpretation of the equal protection clause of the Fourteenth Amendment based on this theory could have been an "adequate" interpretation. *Id.* at 387. In order to accept Dworkin's interpretation of *Plessy*, one would have to accept (i) that it was plausible that in 1896 judges believed the theory of racial equality described above to be true, and (ii) that for judges to have adopted this theory of racial equality would have been a faithful extension of the core principle of equal protection.

63. *Id.*

presumes, America's judges.<sup>64</sup>

Despite one's discomfort with Dworkin's analysis of the *Plessy* Court's reasoning, this example provides a good illustration of law as interpretation.<sup>65</sup> In this case, the meaning of the Constitution is revised because Justices in 1954 came to a different conclusion than Justices in 1896 about whether separate but equal was constitutional. This occurred when the 1954 Justices concluded that the core structure of the Constitution (as manifested in the Fourteenth Amendment) was different from how the 1896 Justices understood this structure. The 1954 Justices came to a new conclusion about the Constitution because they adopted a theory of racial equality different from that of the 1896 Justices.

#### IV. INTERPRETING THE FUGITIVE SLAVE CLAUSE

Part I demonstrated that Dworkin offers three unpersuasive reasons for why nineteenth-century judges held the 1850 Act unconstitutional. The principle that connects Dworkin's theory to his practical conclusions in *Brown*, however, can provide the missing step in Dworkin's argument for the unconstitutionality of the 1850 Act.

It must be noted at the outset that Dworkin's first prong still cannot play a central role in his argument. Because the revised argument is to turn on a new understanding of the political morality of the mid-1800's, this argument must recognize that popular rejection of the constitutionality of the Fugitive Slave Acts does not mean popular rejection of the constitutionality of slavery. With the exception of some Constitutional Utopians,<sup>66</sup> few argued that the Constitution, with its implicit references to slavery, did not actually permit slavery in some parts of the country. Further, it would have been hard for someone to argue in 1840 that the Constitution actively forbade slavery. Slavery was a matter of state law, and it is unlikely that Dworkin could generate not only a

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64. *Id.* We are interested in the preferences of people who lived when the judge lived only to the extent that they illuminate the judge's beliefs. In the case of *Brown*, Dworkin finds it useful to note, in trying to narrow the range of theories that federal judges could have employed, that the theory employed in *Plessy* was not generally accepted. That fact suggests, in the absence of contrary indications, that the federal judges would not have accepted it either. Part IV, *infra*, refers to changes in political morality in contrasting a judge's understanding of the fugitive slave clause with that of the Founders. Because the constitutional attitudes of Northern judges were strongly influenced by the great debates then occurring over the status of slavery, it seems appropriate to use sources describing Northern elites' political morality as an approximate indicator of the beliefs of individual constitutional interpreters.

65. It must be noted that Dworkin's own argument fails on the facts of *Brown*: The Court in *Brown* addressed whether segregated schools could ever be equal, and not whether the white majority's preferences with regard to race could ever be taken into account in the democratic process. *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954); see also Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800-01 (1983) (implying that *Brown* does not establish a general principle of race-neutrality). This criticism of Dworkin's conclusion in the case of *Brown* should not distract from analysis of his method, which is the point of this example.

66. See R. COVER, *supra* note 1, at 154-55; see, e.g. A. KRADITOR, *MEANS AND ENDS IN AMERICAN ABOLITIONISM* 185-86 (1967); L. PERRY, *RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT* 161 (1973).

federal prohibition against slavery, but also some theory of federal common law or federal rights applicable to the states to enforce that prohibition. The Constitution did not approve of slavery, nor did it disapprove of it: its three mentions of the institution regulated a practice which the text could have outlawed but did not (until the Thirteenth Amendment).

The theory of interpretation found in *Brown* can, however, help reformulate and defend the second and third prongs of Dworkin's claim. A combination of these two prongs rebuts the objections to Dworkin's arguments by offering the following claim: the Fugitive Slave Act of 1850 was not constitutional because its application, given the conditions of 1850, violated the principle of comity that allowed the free states to tolerate slavery without compromising the demands of their own legal practices.

This argument can be modeled after the form of argument Dworkin uses to justify *Brown*. Little information exists about the intentions and purposes of the Framers of the fugitive slave clause.<sup>67</sup> As we saw above, however, Dworkin argues that the goal of constitutional interpretation is not to describe the specific state of affairs the Framers intended, but rather to describe the general principle they hoped to build into the Constitution. Just as Dworkin was able to describe a general principle of the Fourteenth Amendment that was "correctly" instantiated by different theories of racial equality at different times, he can do the same with the principle expressed by the fugitive slave clause. The Clause required—most generally—that each state respect the laws of its neighbor; more specifically, it required the states that forbid slavery to deliver runaway slaves to the states that had slavery.<sup>68</sup> But as with the "principle" of racial equality contained in the Fourteenth Amendment, this "principle" of fugitive comity could have had many different theoretical instantiations. One theory Dworkin could advance is as follows: The Constitution, in order to leave questions of the treatment of Blacks within their borders up to each state, could not replace the laws governing the internal regulation of Blacks with federal laws that, in effect, substituted the laws of another state.

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67. The Clause was introduced late in the Convention, raised little debate, and was passed unanimously. See Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 167, 178 (L. Levy & D. Mahoney eds. 1987). The Convention went out of its way to insure that the Clause did not suggest that slavery was approved by federal law. See D. FEHRENBACHER, *supra* note 40, at 12-14; J. Smith, *The Federal Courts and the Black Man in America, 1800-1883*, at 147 n.3 (Ph.D. dissertation, University of North Carolina, Chapel Hill, 1977). It is generally accepted that the collective intent of the Framers, to the extent that one existed, was to mollify both anti- and proslavery sides in order to achieve union. See D. FEHRENBACHER, *supra* note 40, at 14. This claim should not be confused with the popular myth that without the Clause, ratification would have been impossible. *Id.* at 21.

68. It is interesting that legal argument concerning interstate comity and slavery did not invoke the full faith and credit clause. See U.S. CONST. art. IV, § 1. In the 1780's "it was almost axiomatic that the operation of 'normal' . . . reciprocity would not lead to the recognition by one state of the slave property of another." R. COVER, *supra* note 1, at 88. Therefore, in 1787, the operation of the full faith and credit clause (and the conflict of law doctrines against which it was interpreted) on the states' laws on slavery was superseded by the fugitive slave clause and the doctrine that arose around it. See T. MORRIS, *supra* note 20, at 18.

If the Clause is read to refer to this theory, then Dworkin's attack on the 1850 Act can be made on two fronts. First, the Clause, which at root was concerned with the *states'* obligation to return runaways, cannot be read as having granted the federal courts the power to invalidate state processes simply because they were slow or—in the eyes of other states—obstructionist. Thus, the Clause should never have been read to forbid state governments from making fundamental choices about the process necessary for a slave to be “delivered up” to a slave state. Second, the due process clause of the Fifth Amendment limited the sort of processes the federal government could erect to ensure the return of runaway slaves.<sup>69</sup> Unless the process due an accused Black was at least equal to that of the state in which the federal proceeding took place, the “home” state's “pro-Black” processes were being derogated in favor of a Southern state's “anti-Black” processes. These two issues, however, are merely logical extensions of the same central issue, which is: what limits did the fugitive slave clause place on the federal government's power to decide how alleged slaves were to be treated within the Northern states' territory?

This note will not argue that the Clause was necessarily inconsistent with the 1793 Act. It will argue, paralleling Dworkin's argument concerning *Brown*, that even if there existed a theory of fugitive comity that permitted limitations on state regulation of the treatment of Blacks within their borders at the time of the Framing, there is ample evidence that the political morality of Northern elites had rejected this theory by 1850. This morality, in turn, shaped a different theory of comity that would have allowed these judges to strike down the Act.

The theory of interstate comity available to judges in the 1790's and the early nineteenth century may have been something like the following: In order to respect each state's views on slavery, federal law guarantees the slave states their citizens' property rights in slaves in the United States. This theory assumes that the protection of Southern property rights would not conflict with Northern states' domestic law. This assumption may have been credible when Northern states had no body of domestic law designed to address the treatment of accused slaves by domestic or foreign actors. If the laws of Northern states did not conflict with the extraterritorial claims of residents of Southern states, and federal law went no further than to enforce Southern claims, then the principle of comity described above would be consistent with the 1793 Act. A change in conditions—in both the nature of the Northern states' relation to slave-catching and the attitude of Northern governments toward slave-catching—made the Clause's principle of comity incompatible with either Act, however.

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69. See U.S. CONST. amend. V.

### A. *The Clause and Federal Interference*

The Clause does not grant the power to regulate or facilitate the capture of slaves to the federal government. This power was extended to the federal government in the Fugitive Slave Act of 1793.<sup>70</sup> By creating a federal process parallel to the state processes referred to by the Clause, the Act went beyond the language of the Clause. And yet the Act left many elements in the process of removal vague.<sup>71</sup> Although not the case in 1793, at a certain point the federal policy embodied in the Act was bound to conflict with any given state's interest in the operation of its laws with regard to fugitives within its borders. The principle of comity changed between 1793 and 1850 as the world changed. In the early years of the 1793 Act there were few Northern laws about slave-catching to conflict with Southern laws. There was simply much less reason for the Northern states to legislate on the issue of fugitives: the lack of an organized abolition movement meant fewer slaves coming across the border and less popular outrage at the slave-catchers who would enter Northern towns and forcibly remove Blacks to Southern states and inevitably to bondage.<sup>72</sup> The gradual transformation in Northern political morality is illustrated by the rise of "personal liberty" laws,<sup>73</sup> as well as an increase in both the frequency and

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[T]he person to whom such labour or service may be due . . . is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town . . . and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before [shall be certified for removal] . . .

Act of February 12, 1793, 1 Stat. 302 (1793). It is an interesting question whether Congress had the power to legislate with regard to the regulation of the capture of fugitives, since the fugitive slave clause is in Article IV, and Congress's powers are enumerated exclusively in Article I.

71. How, for example, could a party get an accused slave to a court—through violence, or only through the means approved by the plenary power of the state in which the slave-catcher operated? See D. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-85*, at 286 (1971) ("[The Act's] administrative procedures were so cumbersome . . . that it was a 'dead letter' from the start in regions where public sympathies were hostile to slavery."). On the other hand, Fehrenbacher calls the Act "an invitation to kidnapping." D. FEHRENBACHER, *supra* note 40, at 21. Would the accused slave have a right to confront his accuser? See *Wright v. Deacon*, 5 Serg. & Rawle 62 (Pa. 1819) (state court cannot interpose right to jury trial in the rendition process).

72. See R. COVER, *supra* note 1, at 159-60; J. Smith, *supra* note 67, at 164-65 (national fugitive slave policy "stirred relatively little controversy among public" until 1830's). As William Nelson has shown, Northern elites did not come to see Southern domestic slave laws and practices as a threat to the integrity of the domestic affairs of Northern states until the 1830's and 1840's. See Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 533 (1974).

73. These laws were originally passed by Northern legislatures to prevent overzealous slave-catchers from kidnapping free Blacks, but they eventually became an effective mechanism for Northern legislatures to express their increasing impatience with the extension of the tactics of "slave law" into free states even in the pursuit of a "bona fide" slave. See T. MORRIS, *supra*, note 20, at 94-147; J. Smith, *supra* note 67, at 165.

severity of Northern reaction to the use of the 1793 Act by Southern slaveowners.<sup>74</sup>

In the face of this changing political morality in the North, the Clause forced judges into an inescapable dilemma. On the one hand, the Clause specifically called upon states to cooperate in the return of slaves; one could see this federal instruction as a commitment on the part of the federal government to ensure that conflicts over slaves were regulated by more than the usual "inter-state comity" rules that governed choice of law disputes.<sup>75</sup> On the other hand, as Northern states passed more laws regulating how slaves were to be caught within their territory,<sup>76</sup> the federal involvement in slave-catching necessarily had to express a preference in upholding either the North's or the South's conception of how slaves were to be caught. Since the activity always took place in the North, to uphold the Southern conception would increasingly void Northern laws regulating conduct within their own borders.

This Note's revision of the Dworkinian argument rests on the claim that for Northern states to curb their personal liberty laws (or to choose not to pass them out of regard for the Clause) would have violated the Clause's commitment to the principle of comity described above. It would be misleading to say that the free states were, in any significant way, adopting a view about the treatment of Blacks simply by omitting to act in a way that opposed a slave state's interests. However, once the free states developed and articulated a view—upon which they based positive state action—about how alleged slaves should be treated, then each time they curbed their sense of what process was due, and acted *because of* the slave states' interests, they were coerced into choosing the Southern regime over their own. That is why Dworkin can say that the change in the political morality and actions in the North made demands on the Clause that exposed its incompatibility with the Acts. Once that point was reached, to the extent that the Northern states were obliged to act because of the Constitution, the Constitution was not just protecting the slaveholder's

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74. By the 1830's the political ambitions of abolitionism extended beyond what may have once been the province of fringe groups. See, e.g., R. COVER, *supra* note 1, at 253-54 (in 1859, Ohio Supreme Court Justice Joseph Swan not reelected because of antiabolitionist decision in habeas corpus case (*Ex parte* Bushnell, 9 Ohio St. 77 (1859))); in same year, Governor Salmon Chase pledged to use state militia to enforce order of state court to release federal prisoners arrested under 1850 Act); see also *id.* at 176 (in 1853, after Massachusetts Supreme Court refused to issue writ of habeas corpus to accused slave in federal custody, state constitutional convention called to amend Massachusetts constitution to provide for elected judiciary). In addition to formal opposition, there were many episodes of vigilantism in which abolitionists covertly rescued slaves from slave-catchers and federal marshals. See Levy, *Sim's Case: The Fugitive Slave Law in Boston in 1851*, 35 J. NEGRO HIST. 39 (1950).

75. See Horowitz, *supra* note 40; Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74 (1971).

76. An example of such a law is offered in G. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY* 115 (1856) (requiring Pennsylvania judge or magistrate to take extensive affidavits when enforcing 1793 Act).



interest in his slave, but forcing the North to respect that interest through procedures infected with the assumptions of slavery.<sup>77</sup>

For the reasons outlined above, Dworkin should look skeptically upon the arguments made in *Prigg v. Pennsylvania*.<sup>78</sup> Justice Story, speaking for the Court, rejected the argument that the return of slaves was a matter of simple interstate comity, and, as a good student of Marshall, argued that since the Constitution guaranteed slaveowners' right of reclamation, there was an "implied power" on the part of Congress to enforce that right.<sup>79</sup> Justice Story anticipated, but rejected, the Dworkinian argument about changes in political morality resulting in a change in Congress' power to regulate slavery.<sup>80</sup> It is interesting that Justice Story (as well as a plurality of the Court) could not bring himself to part completely with the idea that the states could not choose to recuse themselves from slave-catching while obeying the federal command to cooperate with the slave-catchers. Dicta in *Prigg*, written by Justice Story, argues that the enforcement of the Constitution's command to return slaves was not only *not* a matter of conventional interstate comity, but in fact was a matter of exclusively federal concern.<sup>81</sup> Accordingly, Story concluded that since there was no obligation on the states to enforce the 1793 Act, Pennsylvania was entitled to prohibit its own magistrates from hearing cases brought under the federal statute.<sup>82</sup>

Chief Justice Taney, who wrote a concurring opinion, strongly disagreed with Justice Story's willingness to uphold Pennsylvania's freedom to remove itself from the business of enforcing slaveholders' rights. He saw the contradiction that was explored in our Dworkinian argument above: why would Pennsylvania's prohibition not have the same inhibitory effect on national fugitive slave policy that Pennsylvania's antikidnapping law was declared to have?<sup>83</sup>

The tension concealed in Story's opinion came to light in the years following *Prigg*, when many Northern states passed laws regulating the conduct of

77. As one commentator observed, "[By 1850] [f]ederal enforcement of the fugitive slave clause . . . gave the southern law of slavery an imperial, extrajudicial force within the free states . . . . The effect was to make slaveholding rights national in scope." D. FEHRENBACHER, *supra* note 40, at 24.

78. 41 U.S. (16 Pet.) 539 (1842). This decision was an early attempt to address with a Pennsylvania personal liberty law and set the stage for the conflicts that led to the 1850 Fugitive Slave Act. In *Prigg*, the Court struck down as unconstitutional a law which (i) banned the forcible seizure of Blacks with the intent to return them to a slave state, and (ii) denied to Pennsylvania's magistrates authority to hear any claim brought before them under the 1793 Act. See T. MORRIS, *supra* note 20, at 52-53. *Prigg*, a Maryland slave-catcher, had been convicted of kidnapping under the Pennsylvania law.

79. *Prigg*, 41 U.S. (16 Pet.) at 615-16.

80. Story noted that the Constitution's explicit reference to the return of slaves and the federal power it implies should withstand the changing course of public opinion and "the mutations of public policy." *Id.* at 611-14.

81. *Id.* at 623; see also J. Smith, *supra* note 67, at 167-68.

82. For an alternative account of Story's reasoning in *Prigg*, see Note, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988) (arguing that Story, through use of theory of natural law, could accommodate both his fundamental rejection of slavery and his fundamental commitment to nationalism).

83. *Prigg*, 41 U.S. (16 Pet.) at 627-33 (Taney, C.J., concurring); see also J. Smith, *supra* note 67, at 169.

their own state officers that were clearly designed to render impractical the enforcement of the federal laws, leading eventually to the passage of the Fugitive Slave Act of 1850.<sup>84</sup> The 1850 Act, however, did not really resolve the tension as much as it tried to solve it by fiat. As has been suggested, in the years that followed *Prigg*, Northern states had begun to develop a coherent policy as to the treatment of fugitive slaves such that in regulating civil life within their territory, these states were taking positive steps toward preventing slave-catching.<sup>85</sup> The Court's optimism that federal law could coexist with state inactivity became untenable as soon as state regulation with regard to the due process necessary to remove a fugitive slave began to look more and more like Pennsylvania's unconstitutional antikidnapping law.<sup>86</sup>

### B. *The Clause and Due Process*

The Section above demonstrated that by 1850, the Clause could not have been read to allow unconstrained federal regulation of slave-catching. A related and important point is that even if the Clause were viewed as giving the federal government the power to enforce the Northern states' obligations as set out in the Clause (to "deliver up" slaves), this still does not mean that the federal process used could violate contemporary state standards of due process. A conflict still remained concerning the extent to which the federal rules should reflect the Northern states' belief that any Black brought before a court in the North should enjoy the presumption that she was free until proven otherwise, and the Southern belief that proceedings in the North were little more than sum-

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84. See T. MORRIS, *supra* note 20, at 107-129. William Story argues that his father intended to sabotage the Southern slave-catching efforts by building this tension into *Prigg*. W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* 397-98 (1851).

85. See J. Smith, *supra* note 67, at 172.

86. Someone who accepts Dworkin's theory of interpretation might still make the following objection at this point: why not interpret the passage of the 1850 compromise as an indication of the political culture of the nation and thus as a good approximation of the best theory of the fugitive slave clause available to judges at the time? After all, were not the congressmen who voted for the compromise themselves members of the elite class to which the judges belonged? If Congress believed the Act constitutional, and accepted the Act's picture of federalism, why not assume that this gives us a reliable clue as to the best theory of the clause? To put this objection another way: Dworkin takes advantage of the fact that "no one" believed the *Plessy* theory of racial equality in 1954 (neither the South nor the North); yet the theory of the clause Dworkin wants to discount seemed quite popular in 1850; it was endorsed in national legislation. Dworkin must explain why we should not interpret this disanalogy to mean that even if his theory is correct, the facts of 1850 do not lend themselves to his specific conclusion.

This objection takes too simple a view of how one is supposed to use the fact of changing political culture as "evidence" in Dworkin's theory. One is not supposed to take a simple majoritarian headcount: that returns the theory back to a crude form of positivism. One attempts to obtain an approximation of information which cannot be obtained firsthand: the range of theories actually available to a judge living in 1850. While it is true that the theory "endorsed" by the Compromise of 1850 was certainly a contender at the time, we know also of its rival, the theory of the Compromise's opponents. The depth and strength of opposition to the Compromise of 1850 was significant. See J. RHODES, *HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850*, at 64 (A. Nevins ed. 1966) (leading Northerners repudiated Daniel Webster's decision to work with Henry Clay toward a Senate bill); see also D. FEHRENBACHER, *supra* note 40, at 80 (at no time did entire package of amendments to 1793 Act garner majority in House).

mary extradition hearings, where the presumption was reversed, and that any alleged slave could get a full and fair hearing once they were returned to the state of their alleged master.<sup>87</sup>

Here too, the Dworkinian argument inspired by *Brown* may be used. We should recall what we determined to be the Clause's general principle: comity between the states with regard to how Blacks were to be treated within their borders. Until 1850, there was no special federal procedure for slave-catching, since there were no special federal officers like commissioners.<sup>88</sup> Until 1850, federal judges (if they ever heard a runaway case)<sup>89</sup> applied the procedure of the state in which they sat.<sup>90</sup> This reflected the Clause's general commitment to comity. Under the pre-1850 scheme, as conceptions of due process changed in a Northern state, the federal procedure, which relied on state procedure, thus changed accordingly. Until 1850, a Dworkinian interpreter could claim that the Clause did not permit a person domiciled in Pennsylvania to receive federal procedural protections so thin that, in effect, that person's only real hearing was in South Carolina, with South Carolina "procedure." The denial of this interpretation would provide slave-catchers with guaranteed access to Southern slave law in every fugitive slave case: upon seizing a Black in the North, they then would need only to invoke a shred of federal procedure in order legitimately to introduce Southern law.<sup>91</sup> On the other hand, obedience to the principle of comity would, according to our Dworkinian interpretation, require that federal due process treat Blacks with at least that process they would have received in the state in which they were seized.<sup>92</sup>

Despite the many objections made by courts that clearly support the Dwork-

87. See R. COVER, *supra* note 1, at 163-64; J. Smith, *supra* note 67, at 155-56 (citing 1850 statement of Sen. Roger Baldwin (Conn.)).

88. The Article I commissioner "was to hear the slaveholder or his representative or examine their affidavits, *ex parte*, and issue certificates thereon . . . . Moreover, the act explicitly excluded the alleged fugitive's testimony from the proceeding." R. COVER, *supra* note 1, at 175 (footnote omitted).

89. "In fact, under the act of 1793, nearly all the cases fell into the hands of a few *justices of the peace* in each particular locality . . . ." G. STROUD, *supra* note 76, at 111-12.

90. "According to the Judiciary Act of 1789, the laws of the several states would be the rules of decision in federal courts so that a jurist in a free state could, if he chose, bring the fugitive act into harmony with the Judiciary Act" by employing the procedure of his state. T. MORRIS, *supra* note 20, at 21 (footnote omitted).

91. See D. FEHRENBACHER, *supra* note 40, at 24; G. STROUD, *supra* note 76, at 113 ("A fair trial for freedom IN A SLAVE STATE, by a negro born in a FREE ONE, is impossible.").

92. The Dworkinian arguments above were made in less theoretical language but through more precise objections by politicians and lawyers of the time. The specific violations of due process that were alleged against the 1850 Act were (i) the lack of a full jury trial; (ii) the denial of the alleged slave's right to enter any statement before the federal commissioner; (iii) the fact that the decisionmaker was not an Article III judge but rather an Article I officer; and finally, (iv) the small yet symbolic fact that the commissioner received five dollars for every Black determined to be free and ten dollars for every Black sent to the South. See R. COVER, *supra* note 1, at 175; J. Smith, *supra* note 67, at 160-61. During the debates on the 1850 Act, Senator Roger Baldwin of Connecticut raised many of these concerns. CONG. GLOBE, 31st Cong., 1st Sess. 421 (1850). For due process challenges raised in court, see *Miller v. McQuerry*, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9,583) (holding process required no greater than for extradition, even though "power of the master may be so exercised as to defeat a trial [in the slave state]"); *Charge to the Grand Jury*, 30 F. Cas. 1007 (C.C.S.D.N.Y. 1851) (No. 18,261).

inian point that the 1850 Act violated the principle of neutrality contained in the Clause, few judges propounded explicitly Dworkinian arguments. One set of cases that did frame the debate around the terms defined above, however, occurred when the Wisconsin Supreme Court declared the 1850 Act unconstitutional. In *In re Booth*,<sup>93</sup> the appellants obtained a writ of habeas corpus from the Wisconsin State Supreme Court after being arrested on federal charges of abetting the escape of a slave. The Wisconsin court held that they could not be held on charges of interference since these were based on the 1850 Act and the 1850 Act was void for unconstitutionality.<sup>94</sup> After the Wisconsin court refused to return any writ of error to the U.S. Supreme Court, the U.S. Court overturned the Wisconsin decision from a certified record.<sup>95</sup>

### V. CONCLUSION

We have found and applied the missing step in Dworkin's argument: the theory of comity which correctly represents that the principle for which the Clause stood in 1850 was different from the theory that was correct for 1793. That the Northern states were still obligated to "deliver up" runaway slaves was never in question. The interpretive problem that law as integrity attempts to solve was the extent to which Northern procedure, if used, could interfere with Southern demands for a certain type of delivery.

Dworkin's specific argument about the 1850 Act suggests that Cover's depiction of adjudication in hard cases is a misdescription with serious political consequences. If adjudication in hard cases requires estrangement from one's political commitments, then Cover simultaneously discourages people with political commitments from choosing to become, or remain, judges, while licensing those who remain judges to discount the role of political commitment in the interpretation of the Constitution.<sup>96</sup> Cover's pessimistic view of adjudication is not necessarily correct. Judges in 1850 were not trapped between the formalism of following evil rules or the moral commands of their consciences.

93. 3 Wis. 1 (1854).

94. *Id.* at 66. The court held that the 1850 Act violated the due process requirements of the Fifth Amendment. The opinion by Justice Smith is the best example of the Wisconsin court's Dworkinian reasoning. He argued that the purpose of the Clause was to permit each state to determine whether an alleged slave was really "due to the party who claims him," and argued that the result of the holding in *Prigg* was that "[t]he slave code of every State in the Union is thus engrafted upon the laws of every free State." *Id.* at 122. He also recognized the potential conflict between the Clause and both *Prigg* and the 1850 Act that is noted *supra* text accompanying notes 83-84. *Id.* at 124-26; see also *In re Booth* and Rycraft, 3 Wis. 157 (1854) (enforcing decision in *Booth*).

95. In a unanimous decision, the Court rejected the Wisconsin court's power to overturn federal precedent. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 514 (1858); see also R. COVER *supra* note 1, at 187; T. MORRIS, *supra* note 20, at 174-80.

96. It is telling, then, that Cover and Dworkin both acknowledge in the prefaces to their first books that for each, their purpose was to respond to the actions of judges during the 1960's: Cover, to condemn the "judicial complicity in the crimes of Vietnam" by identifying formalism in adjudication; and Dworkin, to celebrate the Warren Court's "liberal theory of law." R. COVER, *supra* note 1, at xi; R. DWORKIN, *TAKING RIGHTS SERIOUSLY* at vii (1977).